

THE RECORD

OF THE ASSOCIATION OF THE BAR

OF THE CITY OF NEW YORK



VOLUME SEVEN

1952

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THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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Volume 7

January 1952

Number 1

Association Activities

THE COMMITTEE on Entertainment's Annual Twelfth Night Party in the form of "A Serenade to Harrison Tweed, Esq." will be held on January 7 at 8:15 P.M. In the traditional restrained prose of the Committee on Entertainment, of which Boris Kostelanetz is the Chairman, "touching demonstrations of affectionate esteem and regard; tributes; encomiums; and other divertissements" are promised.



AT THE DECEMBER Stated Meeting Paul Windels, Chairman of the Special Committee on Legislative Procedures, presented the report of his Committee which was published in the December number of THE RECORD. The Association approved the report and adopted the following resolutions:

RESOLVED that The Association of the Bar of the City of New York urges the Legislature of the State of New York to require:

(a) firm adherence, in good faith, to the principle that no controversial bill of public importance shall be enacted without an adequate opportunity for public and

legislative discussion, not only of the problem with which the legislation deals, but also of the concrete text of the proposed bill;

(b) that both Houses strictly adhere to a rule which would fix as the last day for the introduction of bills a date which is not later than the middle of each session; that no exception be permitted to this rule except for genuine emergency;

(c) that the introduction of all departmental, administrative agency and legislative committee or commission bills be limited to a period of not more than four weeks after the commencement of the session; that no exception be permitted to this rule except for genuine emergency;

(d) that no action, except in cases of genuine emergency, be taken on a bill until at least 10 days after it shall have been in print, on the members' desks and available for public distribution;

(e) that all standing committees act on all bills referred to them and that the practice of shifting responsibility to the Rules Committee of the Assembly with respect to substantive provisions of legislation be discontinued, except in cases of genuine emergency;

(f) that non-controversial bills and matters of local concern be disposed of as early in the session as may be possible;

(g) that members of the Legislature be urged to draft, with the assistance of the Bill Drafting Commission, and be permitted to file and have bills printed before the session, for formal introduction on the opening day;

(h) that the Legislature establish a Division of Legislative Reference and Research in the State Library for the exclusive use of legislators and legislative committees and under the direction of an advisory legislative committee as recommended in Legislative Document (1946) No. 31.

An interim report calling to the Association's attention the fact that five vacancies would occur in the Court of Special Sessions on December 31 was made by Harris B. Steinberg, Chairman of the Committee on Criminal Courts, Law and Procedure. Mr. Steinberg pointed out that this extraordinarily large turnover in the Court made it imperative that the Mayor's appointees be exceptionally well qualified.

Interim reports were also received from the Special Committee on Improvement of Family Law, Richard H. Wels, Chairman; the Special Committee on Round Table Conferences, Howard Hilton Spellman, Chairman; and the Special Committee on the Unification of the Courts, Porter R. Chandler, Chairman.



THE COMMITTEE ON Trade Regulation and Trade-Marks, Breck P. McAllister, Chairman, will be represented at hearings on the Wiley Bill (S. 1957) to amend the Lanham Trade Mark Act. The Committee will suggest a number of amendments to the legislation.



ON THE AUTHORIZATION of the Judicial Conference of the United States, the Chief Justice, two years ago, appointed a committee of federal judges to examine into the present procedure governing long trials of controversies arising under the antitrust and other laws and under various statutes establishing regulatory agencies with a view to advancing the effective, expeditious and economic disposition of such controversies. That committee has now made a report which has been approved and adopted by the Conference at its sessions on September 24-26, 1951.

The work of the committee was divided into two parts, one dealing with procedure before the courts in cases where trials are protracted and the other with prevalent procedures and methods of their improvement before administrative tribunals. A subcommittee composed of representatives of the adminis-

trative agencies of the federal government, the general counsels of such agencies and lawyers practicing before them was appointed to deal with the latter problem.

The conclusions of the committee as to court procedure were as follows:

1. That unnecessary delay, volume of record, and expense in judicial proceedings constitute an obstruction to the administration of justice; that such delay, volume and expense occur in a sufficient number of cases to constitute a serious problem.

2. That prevention of these conditions depends upon a fixed determination on the part of judges to prevent them and a firm course of action to that end.

3. That the most effective means of preventing unnecessary delay, volume of record, and expense are:

- (a) Conference between judge and counsel prior to trial, such conferences to be of a style and scope to meet the peculiar needs of the particular case;

- (b) the exclusion from the record of all unnecessary, as well as all irrelevant and incompetent, matter; and

- (c) a course of procedure which will minimize delay in the accurate disposition of the cause after the completion of the trial.

Specific methods meeting with the approval of the committee for these purposes are set forth in the report of the committee.

The subcommittee on procedure before administrative tribunals reported that the problem was one which the regulatory agencies themselves must solve and to this end recommended the calling of a conference of the representatives of such agencies by the President for the purpose of devising methods of preventing unnecessary delay, expense and volume of records and of improving the efficiency of the administrative process.

The Administrative Office of the United States Courts has been

authorized to distribute copies of the committee report to every federal judge and to members of the bar on request. Such requests may be made to Henry P. Chandler, Director, Administrative Office of the United States Courts, Supreme Court Building, Washington 13, D. C.

The members of the Judicial Conference committee are: Judge E. Barrett Prettyman of the U. S. Court of Appeals for the District of Columbia Circuit, Chairman, Judge Kimbrough Stone (retired), former Chief Judge of the Court of Appeals for the Eighth Circuit, Chief Judge Calvert Magruder of the Court of Appeals for the First Circuit, Circuit Judge Walter C. Lindley of the Seventh Circuit, and District Judges W. Calvin Chesnut of the District of Maryland, Frank L. Kloeb, Northern District of Ohio, Paul Leahy, Chief Judge, District of Delaware, Vincent L. Leibell, Southern District of New York and Leon R. Yankwich, Chief Judge, Southern District of California.



HENRY P. CHANDLER, Director of the Administrative Office of the United States Courts, was the guest of the Committee on Federal Legislation, Theodore Pearson, Chairman. Mr. Chandler discussed with the Committee proposed federal legislation relating to the correction of the Office of Public Defender. Florence M. Kelley, Attorney-in-Charge of the Criminal Courts Branch of The Legal Aid Society, also was a guest of the Committee and participated in the discussion.



ON MONDAY, JANUARY 7, 1952, at 8:30 P.M., over WNYC-FM (93.9 megacycles), the Committee on Post-Admission Legal Education of The Association of the Bar of the City of New York, Ralph M. Carson, Chairman, will sponsor the first broadcast of a series of lectures given before meetings of the Legal Sections of the Committee. The program is designed not for the general public but for lawyers, and will run for an initial period of thir-

teen weeks. The lectures to be broadcast through January and February are:

Monday, January 7

Price Controls and the Office of Price Stabilization
Harold Leventhal, Herman Hormel, Jr., and Leonard
Rovins.

Monday, January 14

Highlights of the Revenue Act of 1951
Richard Kilcullen

Monday, January 21

"Democracy and Natural Law"
F. Lyman Wyndolph

Monday, January 28

Current Conflicts in Collective Bargaining Issues
David L. Benetar and Herman E. Cooper

Monday, February 4

Legal Aspects of the Controlled Materials Plan (CMP) under
the N.P.A., and Industry's Problems under the CMP
Richardson Bronson and Merrill Russell

Monday, February 11

Pre-trial Practice in the Federal Courts
Judge Vincent L. Leibell

Monday, February 18

Corporate Securities and the Commercial Code
Carlos L. Israels

Monday, February 25

The Excess Profits Tax with Particular Reference to New
Corporations
Joyce Stanley

The University of Arizona College of Law was the winner in the final round of the National Moot Court Competition sponsored by the Committee on Junior Bar Activities, of which John V. Lindsay is the Chairman. Arizona's opponent was Georgetown University Law School, the winner of last year's competition. Associate Justice Harold H. Burton presided over the court which selected Arizona as the winner, and his associates were Judge Herbert F. Goodrich of the U. S. Court of Appeals, 3rd Circuit, Judge Edmund H. Lewis of the New York State Court of Appeals, Judge John J. Parker of the U. S. Court of Appeals, 4th Circuit, and Whitney North Seymour.

In the semi-final rounds Georgetown won over North Carolina and Arizona over Pennsylvania. Judges for these arguments were U. S. Federal District Court Judges Harold M. Kennedy and Edward Weinfeld, Justice Edward S. Dore of the Appellate Division of the N. Y. Supreme Court, N. Y. Supreme Court Justice Charles D. Breitel, Harrison Tweed, and Sinclair Hatch.

In the first preliminary round Cornell won over Northeastern, St. John's over Indiana, Pennsylvania over Catholic, Georgetown over Miami, North Carolina over Notre Dame, Kentucky over Tulane, and Arizona over Ohio State. Vanderbilt drew a bye for this round. In the second preliminary round Georgetown won over Cornell, North Carolina over St. John's, Arizona over Kentucky, and Pennsylvania over Vanderbilt.

Arizona was represented by Charles E. Ares of Tucson and Henry A. Kiker, Jr., of Santa Fe, New Mexico, both third year students in the law school. The winners were presented with the Samuel Seabury Award, in addition to sets of the United States Supreme Court Digest.



AT THE DECEMBER Meeting of the Committee on Real Property Law, Lewis M. Isaacs, Jr., Chairman, Joseph D. McGoldrick, State Rent Administrator, Nathan Heller, Deputy State Rent Administrator, and Jack Sobell, Special Counsel to the State

Rent Administrator, were guests of the Committee. The Committee and its guests exchanged views on their administration of residential rent control.



ON THURSDAY EVENING, January 31, at 10:30 P.M. Station WQXR will broadcast a program dedicated to The Legal Aid Society of New York. Presiding Justice David W. Peck of the Appellate Division will be the speaker on the program and there also will be a presentation of Gilbert and Sullivan's "Trial by Jury."



THE COMMITTEE on Medical Jurisprudence, Edmund T. Delaney, Chairman, is cooperating with the newly established state-wide coordinating committee on alcoholism, of which Harold Riegelman is the chairman. The Committee on Medical Jurisprudence also has under study mandatory blood tests; legal problems in connection with drug addiction; a redefinition of criminal insanity; and a study of commitment procedures.



THE COMMITTEE on Patent Law, Alexander C. Neave, Chairman, is preparing a report on the conflict which exists in the reported opinions regarding the applicability of the venue sections of the Federal Judicial Code insofar as patent suits against corporations are concerned. A report on the Royalty Adjustment Act is also being prepared, as well as a study of tax problems with respect to the sales of patents.



THE COMMITTEE on Legal Education, Archie O. Dawson, Chairman, is studying the disparity between the requirements of the American Bar Association of three years of college work for admission to approved law schools with the rule of the New York Court of Appeals, which requires only two years of pre-legal

education. The Committee also has under study the work of the Character Committee in connection with admission to the New York Bar.



THE COORDINATING Committee of the New York City Bar Associations, under the chairmanship of Julius Applebaum, has established three committees. One of the committees will study the subject of contingent fees, a second the possibility of schedules of minimum fees, and a third committee is considering problems in connection with representation of the legal profession on the stage, radio, and television.



THE HONORABLE Albert Conway was the guest at the November meeting of the Special Committee on Round Table Conferences, Howard Hilton Spellman, Chairman. There was a large attendance and Judge Conway commented informally on various legal problems during the course of the evening's discussion.



A DINNER was held in honor of Frederick F. Greenman by the Committee on the Municipal Court of the City of New York, William G. Mulligan, Chairman. Colonel Greenman served as Chairman of the Committee for the past three years.

The Calendar of the Association

January and February

(As of December 27, 1951)

- January 1 "On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.
- January 2 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates
- January 3 Dinner Meeting of Committee on Entertainment
Meeting of Section on Taxation
Subcommittee on Institutions of Committee on Domestic Relations Court
- January 7 Twelfth Night Festival, 8:15 P.M.
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Price Controls and the Office of Price Stabilization"
- January 8 Dinner Meeting of Committee on Administrative Law
Dinner Meeting of Committee on Domestic Relations Court
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.
- January 9 Meeting of Section on Jurisprudence and Comparative Law
- January 10 "Current Trends in New York Civil Practice and Procedure." Speaker: John F. X. Finn, Esq., 8:00 P.M.
Buffet Supper, 6:15 P.M.
- January 14 Meeting of Section on Drafting of Legal Instruments
Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Professional Ethics
Dinner Meeting of Committee on Trade Regulation and Trade Marks
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Highlights of the Revenue Act of 1951"

- January 15 *Stated Meeting of the Association, 8:00 P.M. Buffet Supper, 6:15 P.M.*
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.
- January 16 Meeting of Committee on Admissions
 Dinner Meeting of Committee on Foreign Law
 Dinner Meeting of Committee on Insurance Law
 Meeting of Section on Labor Law
- January 21 Dinner Meeting of Committee on Courts of Superior Jurisdiction
 Meeting of Library Committee
 Dinner Meeting of Committee on Municipal Affairs
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Democracy and Natural Law"
- January 22 Dinner Meeting of Committee on Aeronautics
 Dinner Meeting of Committee on International Law
 Dinner Meeting of Committee on Medical Jurisprudence
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.
- January 23 Meeting of New York State Bar Association Section on Food, Drug and Cosmetic Law
 Meeting of Committee on Patents
- January 24 Meeting of New York State Bar Association Section on Antitrust Law
- January 25 Annual Meeting of New York State Bar Association
- January 26 Annual Meeting of New York State Bar Association
- January 28 Meeting of Section on Federal Administrative Controls
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Current Conflicts in Collective Bargaining Issues"
- January 29 Meeting of Committee of Auxiliary Members
 Dinner Meeting of Committee on Legal Aid
 Meeting of Section on Litigation
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

- January 30 Meeting of Section on Corporations
Round Table Conference, 8:15 P.M. Guest to be announced later
- February 4 Dinner Meeting of Committee on Federal Legislation
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Legal Aspects of the Controlled Materials Plan (CMP) under the N.P.A., and Industry's Problems under the CMP"
- February 5 Meeting of Committee on State Legislation
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.
- February 6 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates
- February 7 Meeting of Section on Taxation
- February 11 "For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Pre-trial Practice in the Federal Courts"
- February 12 "On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.
- February 13 Dinner Meeting of Committee on Bankruptcy and Corporate Reorganizations
Dinner Meeting of Committee on Military Justice
- February 18 Dinner Meeting of Committee on Courts of Superior Jurisdiction
Meeting of Section on Drafting of Legal Instruments
Dinner Meeting of Committee on Law Reform
Meeting of Library Committee
Dinner Meeting of Committee on Municipal Affairs
Dinner Meeting of Committee on Professional Ethics
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Corporate Securities and the Commercial Code"

- February 19 Lecture by The Honorable Miles F. McDonald, District Attorney, Kings County, 8:00 P.M. *Buffet Supper, 6:15 P.M.*
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.
- February 20 Meeting of Committee on Admissions
Meeting of Committee on Foreign Law
Dinner Meeting of Committee on Insurance Law
Meeting of Section on Labor Law
- February 21 Dinner Meeting of Committee on Administrative Law
- February 25 Meeting of Section on Federal Administrative Controls
Round Table Conference, 8:15 P.M. Guest to be announced later
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "The Excess Profits Tax with Particular Reference to New Corporations"
- February 26 Dinner Meeting of Committee on Broadcasting
Meeting of Section on Litigation
Dinner Meeting of Committee on Medical Jurisprudence
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.
- February 27 Meeting of Section on Corporations
- February 28 Meeting of Committee on Domestic Relations Court
Meeting of Section on Trade Regulation
Dinner Meeting of Committee on Trade Regulation and Trade-Marks

A Publisher Looks at the Law

BY PHILIP L. GRAHAM

A few weeks ago a blunt and inquiring friend wanted to know why I was travelling to your city to make these remarks. I thought of some advice I once received about where and when a newspaperman should speak. It came from one of the greatest and most revered men in my present profession, Dr. Douglas Southall Freeman, of Richmond, during the course of a lengthy visit which happily for me evolved into a short course in practical journalism.

We had talked about the workings of editorial staffs, news coverage, library operations, community relations, circulation, advertising and all that mixture of intellectuality and commerce which goes to make up a newspaper. Finally, Dr. Freeman—who speaks in a prose style which is, like the buffalo, a vanishing national resource—turned to me gravely and said: “Now, there is the matter of making speeches. A publisher or editor will receive many invitations to speak and I shall tell you my formula. If at all possible I will speak before any gathering of subscribers or advertisers of our august publication. Whether it seems possible or not I always manage to appear before certain women’s groups, which are made up of wives who closely advise their husbands on business policies. But if an invitation comes to me from without the borders of this magnificent commonwealth of Virginia—that is different. Then, before I can feel I have something to say, I must hear the jingle of coin.”

Certainly I am unable to fit this occasion under any of those canons. Aside from a few relatives, who are readers as well as listeners because of the ties of kinship, I realize this audience

Editor's Note: Mr. Graham, the publisher of The Washington Post, is a graduate of Harvard Law School and has served as law secretary to Mr. Justice Stanley F. Reed and Mr. Justice Felix Frankfurter. Mr. Graham delivered the lecture published here on November 15, 1951, under the sponsorship of the Committee on Post-Admission Legal Education, Ralph M. Carson, Chairman.

comprises only subscribers of the provincial press of this area. Also, I am aware that you have succeeded, as few others in this century have, in creating a way of life which eliminates advertising as one of the costs of doing business. Finally, while the letters from your officials have been on the highest plane of civility and graciousness, even containing at times a hint of enthusiasm over my coming, I must admit that their cautious draftsmanship has eliminated any careless or ambiguous phrase on which I might raise the slightest claim of honorarium.

"Ah, then," said my inquiring friend, "you must be going because of the call of an old profession—because you were once a lawyer."

That is not quite the reason. For I was not quite "once a lawyer." In a sense, which is sometimes called speaking legally, I suppose I could say I was once a lawyer. I suppose I could say it before Senator McCarthy under oath and not be guilty of perjury, having attended law school, passed a bar examination, and for three years managed not to be fired from legal employ. But I never had a client, never tried a law case, never in short enjoyed that accumulation of experience which, not "speaking legally" but speaking as a lawyer, enables one to act the lawyer's role.

Even though I was never once a lawyer, I am here tonight because of feelings that were nurtured during those years when I was whatever odd, nonlawyer thing I was. One cannot taste even the books of law without sensing its abiding greatness in civilization, without recognizing the rightness of the maxim that, "where law ends, tyranny begins." For the cynics, there may be a bromidic air about the phrase "the majesty of the law." In truth it should be a phrase of robust reality. Law possesses majesty just because it is a *sine qua non* of decent human life, and it is about the majesty of the law that I would speak tonight.

It is the almost crushing pressures of our times that create a special—an urgent—need for all the greatness of the law. For a few minutes I would like to review the forces that have brought on that urgent need. Inevitably I shall have to do so sketchily—

and fortunately I am able to do so with a degree of license which is institutional to journalists though denied even to poets.

Some centuries ago mankind began to grow out of feudalism. Gradually a new system of economic life developed which we call capitalism, and which not so long ago could be called *laissez faire* capitalism. It was a highly simple and understandable system, and for the sheer creation of material goods and services no other system has ever come close to it. Perhaps because it was so simple, it paid little heed to the possibility that man might have wants for other than material things. The effects of this omission were undoubtedly cushioned by the fact that social life is less fluid than economic life, so that for a considerable time the socially unendurable aspects of *laissez faire* were softened by the continued existence of many of the social forms of feudalism—the village, the sense of craft, the family relationships, and the like. This, however, amounted in the long run to little more than a palliative and it became apparent that broader arrangements must be made if modern economics were to be fitted into a way of life and not permitted to turn life itself into a mere production line.

This, of course, did not happen at 8 o'clock on a Tuesday morning all over the world. Over a great sweep of time the problem was sensed by different people in different ways in different places. Broadly speaking—so broadly as to stretch even the elastic of journalistic license—it can be said that two different views became dominating. One view concluded that it was dealing with a deficient but nevertheless serviceable structure, which ought to be improved with some remodeling since it was letting in a bit of weather. The other reasoned that since the roof leaked we ought not be inhibited and should simply burn the place down. The latter, as Edward Crankshaw has so well put it, accepted a "catastrophic point of view." They became the totalitarians. And throughout our lifetime we have witnessed the impact of their "catastrophic point of view" on all our institutions. They turned

loose forces in the world which civilization must master in order to survive.

A great many of the difficulties confronting civilization have come, of course, from an absence of understanding. Perhaps the opposition to totalitarianism has never suffered from lack of size, but it has frequently suffered from lack of knowledge. The strengths of civilization are, after all, drawn from many sources, and the concept of rather firm rules about property rights is only one of those sources. But for too long, much opposition to totalitarianism rested merely on the understandable reluctance of the possessors to be harassed by the dispossessed. It was this, I take it, that Mr. Justice Holmes had in mind when speaking of the 1890's he said, "When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law."

With the passage of time, I think it can fairly be said that a more appropriate understanding of the evil core of totalitarianism has come to be widespread. It is not so clear that we have yet made full progress in understanding the means which civilization should employ, or rather must employ, in its battle for survival. And it is to the lawyer's role in the proper search for those means that I want particularly to address myself.

Let us tonight deal with the immediate. Because of the defeat of Germany and Japan, those totalitarian forces which are called Fascist do not constitute an instant danger. The problem, of course, is Russia, and the particular problems she poses for lawyers arise because she is a foreign power threatening our national security and is able to use in support of her imperialistic purposes a fifth column of nationals of other countries, including our own.

It is impossible in a few paragraphs to inventory fully the danger of the Russian fifth-column in the United States. But a quick appraisal is essential.

The high point of the Russian fifth-column in America almost undoubtedly occurred in the late 30's. For one thing, they were years when the announced Communist policy was at its most moderate level and, for that kind of policy, remarkably constant. The ideology of Marxism gained some appeal because it could be held up as an alternative to the rigors of the depression, and later this attraction was joined and almost eclipsed by the radiant picture of the Soviet Union as the one great bulwark against Hitlerism.

So the days prior to the Nazi-Soviet pact were the flourishing days of the American Communist Party. In those days, and even for some time afterward, when the wartime alliance tended to obscure the facts again, it was a fifth-column of very considerable strength. Communist-directed union leadership controlled the docks and harbors of the Pacific Coast, the ships sailing from the Atlantic Coast, the transportation system of this city, the factories of much of our electrical industry and many of our mines, and they also infiltrated some of our communications including a few newspaper organizations. Allied with this power was the less tangible but hardly less important sympathetic association or direct affiliation of many other citizens in almost every walk of life.

At the peak of their power, the American Communists thus provided a foreign power with forces inside the United States on a scale unknown to our prior history. To keep perspective, we must remind ourselves that the Communists here never came anywhere near their present strength in France of some 20 per cent of the electorate. The vast majority of trade union members as of all other citizens were not bemused, and national Communist voting strength was never more than piddling. If some now disillusioned intellectuals apparently never saw anyone but fellow Communists in the late 30's, that is a commentary on their lack of gregariousness and not, as they sometimes think, evidence that this was once a Marxist state.

The Nazi-Soviet pact was the first major blow to this fifth

column. Possibly if careful advantage had been taken of the war-time alliance this could have been repaired. But the Soviet position could not, or the Soviet nature would not, permit such a development. The strength of their fifth column in America was an inevitable casualty of the naked display of Russia's true purposes in her post-war foreign policy. Today Communist strength in our country is but a puny thing compared to what it was at its height.

This brief and incomplete account of the ebb and flow of Communism in America answers none of our problems. It is relevant only to appraising them. About any such an appraisal there will necessarily be a variety of views. I find even among my own views a lively variety and quite frequently some prickly conflicts. So I state a few of these views—not under any delusion that I am a reservoir of ultimate truth—but as suggestions that may give proportion to our problems.

First, it seems to me that by all odds the most effective forces against the Communist fifth column have been those of knowledge and understanding. Communists can no longer recruit many supporters because the meaning of Russian communism is widely known; because as Mr. Henry L. Stimson put it in 1947: "No sensible American can now avoid this fact, and those who now choose to travel in company with American Communists are very clearly either fools or knaves."

Second, it seems to me that ignorance—the reverse side of the coin—was responsible for much of Communist progress in the 30's. This was aided not only by the fraud of Soviet pretensions, but also by the bumbling buffoonery of many self-appointed scourges of Communism. For example, Mr. Dies was hardly likely to make us deeply aware of Communism's menace by indicating that it somehow involved Mickey Mouse or Shirley Temple. And such stalwarts as the unlamented Mrs. Dilling made their contributions by finding subversion in such strange quarters as the environs of William Allen White.

Third, I take it we are committed as an act of faith to the

proposition that understanding must be relied upon to defeat subversion. Understanding has, as a practical matter, worked against the fifth column here. But our commitment arises out of something deeper than a prediction that there will always be such a happy ending. We know there may be risks in relying on truth and knowledge to rout pestilential ideas, but we are familiar with no other means which can be consonant with freedom. In the remark of Mr. Stimson's which I quoted, he excepted "knaves or fools," and I take it we have made the gamble that if the forces of understanding are given free play there will be only a minority of knaves or fools who may be dealt with under our traditional assumption that guilt is personal.

If it is true then, first, that the forces of understanding have been the major forces in weakening the Communist fifth column, and, second, that we are committed to the proposition that understanding is the proper means to employ in such a situation—if those propositions are true, we are given some meaningful guideposts in these troubled times. They do not, of course, provide back-of-the-book answers for every problem of life, and no one pretending to maturity can expect such. As guiding principles they can make the course of life seem directed and meaningful rather than a tangled maze. In subscribing to them we give heed to General Bradley's admonition that we must steer by the light of the stars and not by the light of each passing ship.

I do not feel that we have always remembered that advice in the six post-war years. Specifically—and I perhaps speak now with an air of authority akin to that with which lawyers often tell us how to run our papers—I feel that the legal profession has substantially failed to meet its proper obligations of supporting individual freedom. This is not merely to say that the members of your profession, like all other Americans, should somehow try to be better citizens. If you have been laggard in the support of individual freedom, you have come close to denying the very reason for your existence as a profession. It is possible to think of lawyers as mere technicians ready to perform one of a variety of services that con-

sumers may want. That is possible, but not very interesting. The law has become a great part of our heritage not because lawyers learned the techniques of pleading or brief writing, but because as Chief Justice Hughes said they were ministers of justice.

Over the past six years the conscience of this country has wrestled with the most terrible problems of balancing individual freedom and national security. This is a time of great fear, and properly so. There are no ghosts abroad in the world; instead there are real, tangible forces of evil which now possess the power to destroy a good many of us. In such an atmosphere the sincere desire of many people for easy answers is inevitable. Equally inevitable is the arising of opportunist knaves with easy answers.

For six years a good many of those easy answers have been proposed in areas which are the areas of your special competence and special obligation—areas of balancing the relationships of governments and men. When existing institutions and cherished traditions come under attack, the public can only judge their worth if they are defended by people familiar with their strengths. If instead of defense there is silence, it is only natural to assume that the wisdom of change is unanimously accepted. By and large, the attitudes of the bar have indicated silent acquiescence in, and even occasionally affirmative support for, innovations affecting personal freedom that would have raised the collective hairs of this Association straight on end not many years ago.

We now have, for example, two broad Governmental policies that will inevitably create an atmosphere never known in America before. On the one hand, we are going to have our Government spend some \$80 billion of our annual national income. On the other hand, we are going to place the millions of Americans needed in so large a Government under a loyalty program which has few similarities to our traditional ideas of due process. The *de minimis* argument—that after all no one has to work for the Government—might have had great force in Mr. Coolidge's day, but it has a hollow ring today when clearly a great many people must work for an \$80 billion government.

So far as I have been able to ascertain, the loyalty program is probably better run than many Government programs. Despite some of the claims of critics, I have found that those involved in the program are almost universally aware of the civil liberties problems involved in their unpleasant tasks. But it is the essence of any bureaucracy that there must be mistakes, and there have been mistakes in the loyalty program. With adroit handling, through good counsel or "knowing the right people," some mistakes are straightened out.

I know a newspaperman who was talked into entering Government employ overseas in an area where he had special qualifications that were badly needed. After he terminated his newspaper job—and salary—it was discovered that he was not "cleared." A few months and several hundred dollars later he finally entered Government service. His trouble arose because of confusion with a man of the same name; his solution was reached only because the head of his agency, a most senior official, was willing to spend two days of his time on the matter.

Another case involved a professor who agreed to spend two months abroad as a consultant because the request was put on a patriotic basis he could not refuse. His two months were principally spent in untangling a clearance problem. Though the delay made the trip purposeless, he had no choice but to insist on a final decision, for withdrawal would have had the earmarks of confession. His trouble was that he was confused with his father after whom he had been named. His father's trouble was that he had once contributed to an organization for Loyalist Spain. The son is now cleared, necessarily without removing the cloud over the father, who would have to seek out Government employment to get a clearance. Meanwhile, I trust they both have learned the dangers of parental vanity in naming sons junior.

It is only natural that there must be such mistakes in a program covering millions of people. Probably the margin of error is smaller than with other Government programs. But how did we come to lowering the rights of the individual to the status of a

routine administrative matter? And have we no alternative to the continuance and even expansion of such a course?

One does not, of course, escape the loyalty program merely by remaining in private employ. The loyalty process is being extended to a variety of fields of Governmental activity. Recently a respected Harvard professor, an expert on the Far East seeking to spend a sabbatical year in Japan, was denied a permit on loyalty grounds. In such cases there are not even the limited procedural safeguards of the loyalty program, for there is no hearing, no avenue of appeal, no notice of charges, nothing but the bare refusal. Obviously, the inability to travel in Japan is a major handicap to a scholar interested in the Far East. Of course, it can be said that he did not have to be a Far Eastern scholar, that he might have pursued the study of soil erosion in middle New England, but it can also be answered that we had no such rules in America when today's scholars chose their fields.

A kind of loyalty program goes even beyond any realm of Government activity. For a time at least, there operated in the radio and television industry a system under which one was banned by being listed in a privately published booklet and "cleared" only by appealing to a group of private citizens, who in a new extension of free enterprise, had set themselves up so to speak in competition to the Government. In a variety of other industries it is possible, I am told, for management to retain similar clearance organizations, though I have never been told what recourse the discharged employee or the employee not hired may have. And, also beyond the Federal Government, demands for conformity in the name of loyalty are being felt in our schools and colleges where expression ought to be most free.

Within the Government, the formal loyalty program is by no means the end of the matter. Even if one is fully cleared under the loyalty program, he may suddenly be honored with Congressional attention. This takes many forms. You are familiar with some of the noisier forms which are displayed in public hearings or on the floor of the House or Senate. A less well-known development is

now coming into full bloom under Senator McCarran's special sub-committee. In addition to its historical research on the Far East, of which this Committee conducts some part in public, it also acts as a sort of roving Civil Service Commission above and beyond the rest of Government. Apparently this work is done in a manner which is our highest present achievement in the elimination of all decent procedural safeguards.

Now only Mr. Stimson's "knaves or fools" can solve the problems thus created by saying the loyalty program and its extensions are mere witch-hunting. On the contrary, in their beginnings at least, they were a response to proved cases of Russian espionage. Whether they are appropriate measures, whether they are the best available measures is something else again.

The loyalty program is now almost four years old. It has not, so far as the public has been told, yet unearthed a single case of espionage. Miss Judith Coplon, I was told by a gentleman then responsible for much of the program, "sailed through the loyalty tests like a McKinley Republican." If the program has accomplished little of value, it has simultaneously done considerable mischief to individual freedom.

There is not time tonight for detailed examination of the loyalty program. But it is worth reminding ourselves of one central aspect which is wholly novel to our civilized ideas of jurisprudence—that is the reliance upon unknown witnesses. If Mr. Smith comes under suspicion, the officials for whom he works and the boards who will consider his case and even Mr. Smith himself may all be entirely ignorant of who made the charges against him. Thus they have no thorough means of testing the credibility of the charges. This state of affairs is caused by a practical problem—the investigative agencies must protect some agents and informers. At times the protection may be so thorough that the accused not only does not know who accuses him but also cannot find out what he is accused of. Such an atmosphere can be no end confusing to an American used to freedom; it would better fit one accustomed to Soviet justice.

And while in some instances there may be no escape from such procedures, we should always keep in mind that they are inherently hostile to a free society. This is not a matter of sentimentalism. Such basic concepts of due process as the confrontation of witnesses were not devised by dreamers or theorists. They emerged from practical testings, from day-to-day experience in the courts, and they emerged as hard-headed answers to the problems of finding a decent way of life.

There are suggestions that the loyalty program be restricted to people actually having access to information affecting national security, that we run the risk of an occasional Communist charwoman in a village post office. There are suggestions that Review Boards at least should be able to confront accusing witnesses. There must be a variety of means whereby we can strike a better balance between individual liberty and national security than we are now doing.

But what has happened to the voice of the legal profession during the years that these problems have been in ferment? To many who have listened for it, the Bar has appeared suddenly struck dumb.

Over thirty years ago this Association raised its voice against the expulsion of the Socialist legislators at Albany. One of your most eminent members, Mr. Charles Evans Hughes, added to the literature of liberty when he reminded the Legislature for this Association that "it is of the essence of the institution of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts." At about the same time, twelve distinguished lawyers, led by Dean Roscoe Pound, agreed as a public service to examine the deportation raids of Attorney General Palmer. They addressed a document to the American people which charged the Department of Justice with six violations of law and concluded with these remarks:

"Free men cannot be driven and repressed; they must be led. Free men respect justice and follow truth, but arbi-

trary power they will oppose until the end of time. There is no danger of revolution so great as that created by suppression, by ruthlessness, and by deliberate violation of the simple rules of American law and American decency."

Only thirteen years ago, the Supreme Court decided that the Constitution extended to Mr. Frank Hague's Jersey City, despite his contrary view. There appeared as *Amicus curiae* in the *Hague* case, the American Bar Association's Committee on the Bill of Rights, composed of such leaders of the Bar as Douglas Arant, Zechariah Chafee, Grenville Clark, Lloyd Garrison, Monte Lemann, John Francis Neylan and Charles Taft. If there has been such a Committee in the past six years, its existence has become a closely guarded secret.

That is not so say there have been no expressions of concern from the legal profession. The roster of opposition to the American Bar Association's support of a special oath for lawyers, for example, contained some eminent names. But they are largely the men who did the same work twenty or thirty years ago. The hush of quiet seems to typify many of those generations of the Bar who are junior to Charles C. Burlingham, John W. Davis or John Lord O'Brian.

It is to the shame of this great profession that others have largely provided the leadership and taken the blows in defense of those Constitutional rights of which you should be especial guardians. A group of businessmen, the Committee for Economic Development, saw fit to publish a serious and intelligent analysis on "National Security and Our Individual Freedom," but nothing vaguely comparable has come from the Bar. It is to the credit of this Association that you have given attention to the need for establishing procedural standards for Congressional committees. But by and large the Bar has shown little interest in that degradation of our democratic institutions of which Senator McCarthy has become symbolic. When a Senator proposed a sort of loyalty investigation for all Federal judges as though they were

postmasters or county agents, when another Senator announced that a Federal judge in Hawaii would not be reappointed because his ideas on reasonable bail did not coincide with the Senator's ideas, when Congressmen filled the Record with attacks on the rulings of Judge Kaufman—on all those occasions and on others, many people waited for the Bar's support of the American tradition of an independent judiciary and, save for a few honorable exceptions, they waited in vain.

Especially needed in these times of fear has been the creation of some respected body to examine how we can achieve a better balance of individual freedom and national security. The President—after some initial reluctance—proposed such a Commission and appointed to it a group of most distinguished Americans headed by Admiral Nimitz. Senator McCarran, who cannot imagine making any adjustments in the name of individual freedom, has managed to prevent the operation of the Nimitz Commission. So in the Fall of this year, in a remarkable state document, the President of the United States asked the American Bar Association to turn its attention to the same matters. He reminded the Bar that: "Lawyers of the past have risked the obloquy of the uninformed to protect the rights of the most degraded." He concluded by saying: "I believe the Bar has a profound contribution to make in this vital area of national policy and practice, and, moreover, has a moral responsibility to make that contribution."

There is no evidence to date that this unique appeal from the President to the Bar has awakened that moral responsibility.

What are the causes of this unprecedented lack of concern on the part of the Bar? In an attempt to discern them I sought out several eminent practitioners, old warriors in the battles for freedom. There was considerable agreement in their analyses. They spoke of the tendency toward specialization in the practice today, of how this lack of diversified experience made technicians rather than professional men, of the subservience of many lawyers to their client's points of view, of the growing tendency to consider a

lawyer a part of his client rather than a part of the law, and in general of the growing commercialization of the profession. No longer is it true, said one great practitioner, that a lawyer is the leading man of his community whose advice is sought on the great public issues of the day. If this trend continues, lamented another, then our once great profession can no longer pretend to be guided by a sense of public responsibility higher than the ordinary self-interest of businessmen and merchants. While I listened to him, I thought of the ironical fact of that excellent document of the Committee for Economic Development which I have mentioned. That document is a reminder to the American people of the claims of individual freedom, and it was produced by a group of businessmen under the leadership of a retail merchant. In the days of our past when the American ideals were being given their original form, our countrymen relied for such reminders upon Thomas Jefferson and not upon the forbears of Abraham & Strauss.

As we view America's future, we of the laity can get no real solace from the fact that others have responded to those obligations that are properly your first responsibility. There can be no civilization without the majesty of the law, and the law can have no majesty unless the Bar serves it to the full.

Our Nation is now engaged in a great remobilization that will give us a vast physical superiority, a preponderant balance of material power. Simultaneously we must achieve a spiritual remobilization, and an integral part of this involves the reaffirming of America's dedication to personal freedom. In that task a great responsibility rests upon America's "ministers of justice"—the members of the American Bar.

Review of Recent Decisions of the United States Supreme Court

By MARVIN SCHWARTZ and EDWIN M. ZIMMERMAN

STACK V. BOYLE

(November 5, 1951)

Indictments were returned against petitioners in the United States District Court for the Southern District of California, charging them with conspiring to organize the Communist Party of the United States as a group to teach and advocate the overthrow of the government by force and violence, in violation of the Smith Act, 18 U.S.C. secs. 371, 2385 (1946 ed., Supp. IV). The maximum penalty for the offense charged is imprisonment for not more than five years and a fine of not more than \$5,000. The District Court fixed bail for each petitioner in the amount of \$50,000.

Petitioners moved in the District Court for reduction of bail on the ground that the bail as fixed was excessive under the Eighth Amendment. In support of their motions they submitted data on their financial resources, family relationships, health and prior criminal records. The government conceded that the bail originally fixed was in a "sum much higher than that usually imposed for offenses with like penalties" and rested upon a showing that four persons out of eleven convicted under the Smith Act in the Southern District of New York had "jumped" bail.

Upon denial of the motions to reduce bail, petitioners applied immediately to the same court for writs of habeas corpus. The applications were denied and the Ninth Circuit affirmed their denial. Petitioners then applied to Mr. Justice Douglas, as Circuit Justice for the Ninth Circuit, for bail and, in the alternative, for habeas corpus. Both applications were referred by Mr. Justice Douglas to the entire Court, which set the matter down for argument. Peti-

Editor's Note: Howard C. Buschman, Jr., and Fred N. Fishman, who have so ably reviewed recent decisions of the United States Supreme Court for THE RECORD, find it necessary to relinquish their responsibility for this department. Their successors will be Joseph Barbash (A.B., Rutgers, 1941; LL.B., Harvard, 1948; Law Clerk, Judge Learned Hand, Oct. 1948 Term; Law Clerk, Justice Stanley Reed, Oct. 1949 Term); Marvin Schwartz (Pennsylvania; LL.B., Pennsylvania, 1949; Law Clerk, Judge Herbert F. Goodrich, Oct. 1949 Term; Law Clerk, Justice Harold H. Burton, Oct. 1950 Term); Robert B. von Mehren (B.A., Yale, 1943; LL.B., Harvard, 1946; Law Clerk, Judge Learned Hand, Oct. 1946 Term; Law Clerk, Justice Stanley Reed, Oct. 1947 Term); and Edwin M. Zimmerman (A.B., Columbia, 1944; LL.B., Columbia, 1949; Law Clerk, Judge Simon H. Rifkind, Oct. 1949 Term; Law Clerk, Justice Stanley Reed, Oct. 1950 Term).

tioners subsequently petitioned for certiorari from the judgment of the Ninth Circuit affirming the denial of habeas corpus.

The Court, in an opinion by Chief Justice Vinson, vacated the judgments denying the applications for habeas corpus and outlined the procedure to be followed in challenging bail in the federal courts. The Court found it unnecessary to determine the power of a single member of the Court to fix bail in cases of this kind.

The Court held that the proper procedure for challenging bail in the federal courts is not by application for habeas corpus but by motion in the District Court for reduction of bail. To dispose of the case before it on certiorari, the Court need have gone no further. However, the Court did, in a procedure unusual for it, go on to say that the bail fixed by the District Court in this case was excessive.

The opinion of the Court holds that the traditional standards expressed in Rule 46 of the Federal Rules of Criminal Procedure are to be applied in each case to each defendant. Those traditional standards, as embodied in Rule 46, are that every person accused of a non-capital offense *shall* be admitted to bail in an amount no greater than that necessary to "insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." The Court held that "To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act." Apart from the standards embodied in Rule 46, bail set at a figure higher than one reasonably calculated to insure the presence of the defendant is "excessive" under the Eighth Amendment. The Court concluded that "the fixing of bail before trial in these cases cannot be squared with the statutory and constitutional standards for admission to bail."

Having held that the proper procedure for challenging bail in the federal courts is by motion in the District Court for reduction of bail and by appeal to the Court of Appeals from an order denying such motion, the Court faced the question whether an order denying a motion to reduce bail is a "final decision" and hence appealable under 28 U.S.C. sec. 1291 (1946 ed., Supp. IV). The Court said that

"As there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable as a 'final decision' of the District Court. . . ."

In support of what appears to be the proposition that District Court orders are "final" and hence appealable if they do not involve the proper exercise of discretion, the Court cited *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 545-547 (1949), in which the opinion of the Court was written by Mr. Justice Jackson.

In the instant case, Mr. Justice Jackson wrote a separate opinion, in which he was joined by Mr. Justice Frankfurter. Mr. Justice Jackson found it unnec-

essary to determine whether the procedure followed by the District Court squared with constitutional standards but was of the opinion that "the whole matter should be reconsidered by the appropriate judges in the traditional spirit of bail procedure" and that the proper procedure for challenging bail is by motion in the District Court to reduce bail. He took issue with the Court on the theory under which orders denying motions to reduce bail are appealable. Such orders are appealable not "because every claim of excessive bail raises a constitutional question," but because an order fixing bail can be reviewed without halting the main trial, because the bail issue is independent of the main issues to be tried and because the bail question can never be reviewed at all unless it can be reviewed before sentence.

Mr. Justice Jackson went on to give his construction of Rule 45 of the Rules of the Supreme Court, which relates to bail pending review of habeas corpus cases. He would hold that in the case of an application for bail pending review of a denial of habeas corpus, only the full Court, as distinguished from a single justice thereof, may grant relief. But "If the application to Mr. Justice Douglas be treated as one made for fixing bail in the original case, it is my opinion that he has power to entertain it."

Mr. Justice Minton did not participate:

STEFANELLI V. MINARD

(December 3, 1951)

A Fourteenth Amendment right whose existence was acknowledged by the Court only two years ago in *Wolf v. Colorado*, 338 U.S. 25 (1949), came home to an uncomfortable roost this term in *Stefanelli v. Minard*.

In *Wolf v. Colorado*, the Court had before it a state court conviction based upon evidence which had been obtained through an unreasonable search and seizure by state officers. The Court held, in an opinion by Mr. Justice Frankfurter, that the Fourteenth Amendment did not require reversal of a conviction so obtained. Yet the Court said in that case that

"The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause

... "

of the Fourteenth Amendment.

In the instant case, New Jersey police entered petitioners' homes without legal authority and seized bookmaking paraphernalia. Like Colorado, and for that matter, like New York, New Jersey permits the receipt in evidence of property which has been illegally seized by state officers. Hence, petitioners made no effort in the New Jersey courts to suppress the illegally seized evidence. Instead, petitioners sought relief in the federal courts under the Federal Civil Rights Act. They asked that the illegally seized evidence be

returned to them and that its use in state criminal proceedings against them be enjoined.

Petitioners laid alongside the language used by the Court in *Wolf v. Colorado* the language of section 1979 of the Revised Statutes, 8 U.S.C. sec. 43 (1946 ed.), which provides for a remedy "in equity" against any person who, under color of state law, causes another to be subjected to the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Petitioners argued that under *Wolf v. Colorado* they were possessed of a Fourteenth Amendment right against unreasonable searches and seizures by state officers. Here, they argued, there were admittedly unreasonable searches and seizures by state officers. To redress all such deprivations of Fourteenth Amendment rights, they continued, the Reconstruction Congress had expressly provided for a remedy "in equity." Equity should intervene before trial in the state courts, it was contended, because under *Wolf v. Colorado* the Supreme Court would be powerless to intervene after conviction.

Petitioners' complaints were dismissed by the District Court. The Third Circuit, despite its recent decision to the contrary in *Cooper v. Hutchinson*, 184 F. 2d 119 (3d Cir. 1950), affirmed on the ground that exhaustion of state remedies was a prerequisite to relief under the Civil Rights Act.

In affirming the judgments below on certiorari, the Court, again through Mr. Justice Frankfurter, saw no paradox in the existence of a constitutional right that it is for all practical purposes unenforceable. The Court did not decide whether the complaints stated causes of action under section 1979 of the Revised Statutes; it held that the federal courts, in the exercise of their discretion to give or withhold equitable relief, should refuse to intervene in state criminal proceedings to suppress the use of evidence which has been unlawfully seized. "The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law." As in *Collins v. Hardyman*, 341 U.S. 651 (1951), and *United States v. Williams*, 341 U.S. 70 (1951) (but compare *Williams v. United States*, 341 U.S. 97 [1951]), the Court again evinced reluctance to give full scope to the Civil Rights Act. Section 1979 of the Revised Statutes, the Court said, is but one of the "remaining fragments of a comprehensive enactment, dismembered by partial repeal and invalidity, loosely and blindly drafted in the first instance, and drawing on the whole Constitution itself for its scope and meaning."

If one proceeds from what the Court held in *Wolf v. Colorado*, as distinguished from what it said, the Court's decision in the instant case is beyond challenge. The rejection by the Court in *Wolf v. Colorado* of the one remedy least likely to be productive of state-federal friction, reversal of the conviction, is little reason for approving the administratively unsound remedy of injunctive interference in state criminal proceedings. Now the only remedy left under the Civil Rights Act to victims of unreasonable searches and seizures by state officers may be the dubious one of an action for damages. Thus the only effective remedy remaining lies in strict enforcement by the states

themselves of state laws against unreasonable searches and seizures by state officers.

Mr. Justice Black and Mr. Justice Clark concurred without opinion in the judgment of the Court. Mr. Justice Minton did not participate and Mr. Justice Douglas dissented, adhering to the views expressed in dissent in *Wolf v. Colorado*: "To hold first that the evidence may be admitted and second that its use may not be enjoined is to make the Fourth Amendment an empty and hollow guarantee so far as state prosecutions are concerned."

U. S. V. WUNDERLICH

(November 26, 1951)

The "finality clause" of a standard form government contract provides that all disputes involving questions of fact are to be decided by the government contracting officer with a right of appeal to the head of the department "whose decision shall be final and conclusive upon the parties thereto." In *U.S. v. Moorman*, 338 U.S. 457, the Court upheld the validity of this clause. Now, the Court had to consider the binding effect of the clause.

The respondents, who had contracted to build a dam for the United States, sought rulings from the Secretary of the Interior pursuant to the right granted them by the "finality clause." Dissatisfied with those rulings, respondents then sought to have them overturned in the Court of Claims. That court did set aside the department head's decision on a question of fact.

Mr. Justice Minton, writing for a majority of six, reversed the Court of Claims in a brief opinion. He reasoned that the decision of the department head was, by the terms of the contract, to be final and could be overturned by a court only in the event of fraud or "such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment. . . ." Justice Minton then proceeded to equate 'gross mistake implying bad faith' with 'fraud,' and concluded that the department head's decision was final unless "founded on fraud, alleged and proved." The findings of the Court of Claims that the decision of the department head was "arbitrary," "capricious," and "grossly erroneous" did not suffice to release the respondents from the impact of a decision which they had agreed should be final.

Nor would the Supreme Court remand the case to the Court of Claims for a finding on the issue of fraud. There was no allegation of fraud, no finding of fraud, and no request for such a finding. Moreover, Justice Minton assumed that had the evidence sufficed to constitute fraud, the Court of Claims would have so found. Absent such a finding the department head's decision could not be set aside, and the judgment of the Court of Claims purporting to do so had to be reversed.

Mr. Justice Douglas dissented in an opinion concurred in by Mr. Justice Reed. Mr. Justice Jackson dissented in a separate opinion.

Justice Douglas criticized the majority opinion as giving a government con-

tracting officer a tyrant's power over the private business man. He is not content to regard the matter solely as one in which the respondents voluntarily contracted for an arbitral manner of settling disputes. He would allow the Court of Claims "the agency close to these disputes, to reverse an official whose conduct is plainly out of bounds whether he is fraudulent, perverse, captious, incompetent, or just palpably wrong."

Justice Jackson in his dissent points out that the upshot of the majority opinion is to read out of the *Moorman* formula the exception to finality in cases of "such gross mistake as would necessarily imply bad faith," and to leave only "fraud." Although the contracting parties may have agreed to put the decision of disputes in the hands of one of them, the official undertaking to act as judge in his own case had a duty not to make arbitrary use of his power. Justice Jackson would hold the official to standards of good faith and care. A gross mistake necessarily implying bad faith need not have its origin in corruption but may be due to "overzeal for the department, negligence of the deciding official, prejudice against the contractor, or other causes that fall short of actual corruption. Men are more often bribed by their loyalties and ambitions than by money." When such occurs, Justice Jackson believes there should be a judicial remedy.

Committee Reports

COMMITTEE ON MEDICAL JURISPRUDENCE

PRESENT STATUS OF NEW YORK LEGISLATION PERTAINING TO ALCOHOLICS

By EDMUND T. DELANEY

The traditional approach to the problem of alcoholism in New York State, as in every other state in the union, has been from the viewpoint of punishment rather than that of treatment of a disease. Since 1940, however, considerable attention has been given to the treatment of alcoholism as a disease, the rehabilitation of individual alcoholics and the relationship of the alcoholic to society. In the past ten years, approximately 31 states have enacted legislation of some character dealing with the problem of alcoholism and the recognition of its medical and spiritual aspects. These bills range all the way from simple surveys and studies to well-established programs of rehabilitation through clinics or hospitals set up and operated in whole or in part with state funds. States which have well integrated programs are Connecticut, Virginia and Wisconsin.

New York State remains among the minority of states which so far have not enacted any legislation covering this problem. Until the turn of the century, intoxication was dealt with through charges involving disorderly conduct or vagrancy. A provision of the Penal Law in force in 1897 provided that, "Any person intoxicated in a public place is guilty of a misdemeanor, and may be arrested without a warrant while so intoxicated." In 1911, however, the statute was amended by striking out the words, "is guilty of a misdemeanor" and this evidenced an intention on the part of the legislature that intoxication in a public place should no longer be considered as a "crime" but merely that such a person might be arrested without a warrant while so intoxicated. (*People v. Waters*, 153 Misc. 686, 275 N.Y.S. 864).

The year before this amendment was made the Inferior Criminal Courts Act was amended in order to give New York City the power to establish a "Board of Inebriety" and hospitals and industrial colonies for those who were found to be publicly intoxicated. This was followed in 1911 by an amendment of the General Municipal Law (Sections 136-139B) providing for the establishment of "Boards of Inebriety" by localities outside of New York City desiring them. Under these sections any Board so created was

Editor's Note: This report by Mr. Delaney, the Chairman of the Association's Committee on Medical Jurisprudence, and the report following it by City Magistrate Morris Ploscowe were prepared for the city-wide Coordinating Committee on Alcoholism, of which Harold Riegelman is Chairman.

empowered to establish hospitals and industrial colonies in which persons convicted of public intoxication might be committed.

The experience of the City of New York in dealing with the problem under the enabling legislation previously referred to is an illustration of the inadequacy of the governing laws. In 1911, a hospital and colony was established at Warwick, in Orange County, by the Board of Inebriety, but only one report was ever filed on the colony, the first report. In 1920, after the enactment of prohibition, the Board was abolished and the colony at Warwick was closed. The powers and duties of the Board were transferred to the Department of Correction—evidence of the punitive approach—and apparently no further action has been taken by the Department of Correction except insofar as the penitentiary on Riker's Island receives a number of alcoholics sentenced on various charges.

Apart from Section 804 of the Education Law which provides for the compulsory teaching in schools of the evil effects of alcohol, the only other provisions concerning alcoholism in the New York statutes are to be found in Section 201 of the Mental Hygiene Law which permits an alcoholic, described therein as an "alleged inebriate," to be committed to a private, licensed institution by a judge of a court of record. This is done upon an application which may be made by any person with whom the alleged inebriate resides, a member of his immediate family or any relative or friend, or officer of a well-recognized charitable institution or some public welfare officer, or by the alleged inebriate himself. There must be a consent in writing on the part of the physician in charge of the institution and there must be two certificates, verified by two examiners showing that the alleged inebriate is incapable or unfit to properly conduct himself, or his own affairs, or is dangerous to himself or others by reason of frequent drunkenness induced either by the use of alcohol or of drugs or other intoxicating substances. Such certificate must show that such person is in actual need of specific care or treatment and that his condition is such that his detention, care and treatment would be likely to effect a cure. The certificate must be supported by a personal examination. Section 201 contains further provisions whereby a person so certified or a relative or friend of his may within 30 days apply for a review of the order of certification to a Justice of the Supreme Court. The matter is then given to a jury which passes upon the question of the inebriety of such person.

It will be noted that under this section commitment is possible only upon the consent of the physician in charge of the private, licensed institution. As a matter of practice, private institutions are unwilling to assume the responsibility for consenting to such commitments for fear that they might later be subject to liability on grounds of false imprisonment. Moreover, the high cost of care in the private institution makes it impossible for all but the very few to take advantage of the provisions of this section.

Under the present statutes in New York there are no public facilities organized to take alcoholics with the exception of one single rehabilitation

clinic operated by the State of New York in Buffalo. Under State law only psychotics may be retained and treated in state mental hygiene institutions.

Thus it is at present in New York a reclaimable alcoholic has little opportunity for treatment, nor are there any provisions in the law which will protect families or alcoholics, or which provide for some commitment procedure whereby such an alcoholic may be required to submit to treatment. It is recognized, of course, that compulsory treatment has had little success in the past. Nevertheless, it is believed that some provision should be made whereby one who because of alcoholism is a menace to his family and to others may be required under some court order at least to report to a clinic for treatment.

It is believed that in due course the State of New York will be compelled to adopt some all-embracing program covering this important subject. Progress, however, inevitably must take place in stages. As the first stage, it is believed that additional State facilities should be established in order to expand the rehabilitation program already in effect in Buffalo operated by the executive departments most immediately concerned. The next logical step would appear to be an overall study of the problem with a view to the formulation of an integrated program. Because of the many different viewpoints and the varying approaches to the subject evidenced in other states, it is only through some form of commission to investigate and report that the most successful methods can be analyzed and the results of these procedures evaluated so that definite recommendations can be made for future legislation in the State.

November 29, 1951

TREATMENT OF THE CHRONIC ALCOHOLIC IN NEW YORK CITY

By MORRIS PLOSCOWE

Scores of men and women, in various stages of intoxication, are arrested each day, charged with disorderly conduct, vagrancy or soliciting alms. They cannot be charged with public intoxication, since this is no longer an offense under the law. The disorderly conduct involved consists normally of drinking wine or liquor out of a bottle, to the annoyance of others, or lying on a park bench, doorway or sidewalk, to the annoyance of others.

If the defendants pleaded not guilty to these charges and demanded a trial, the charges would have to be dismissed. Annoyance to others is an element of the charge and must be proved before there can be a conviction. The arresting officer is rarely in a position to show that any specific individuals have been annoyed by the defendants. Most defendants, however, plead guilty to the charges aforementioned. Many of those who

plead guilty are chronic alcoholics and derelicts. The difficulty with our present procedure is that it is difficult for the judge to separate the chronic alcoholics and the derelicts from the occasional drunk or the regularly employed workman who is off on a spree.

The alcoholics are brought to the various district courts of the Magistrates' Courts if they are arrested on week days, or to the Week-End Court if arrested on Saturdays and Sundays. If arrested after 3:00 p.m., they are brought to Night Court. Normally, the alcoholics are brought to court and arraigned in groups which number from two to forty men.

These groups may be composed of many different types of individuals. The working man who goes off on an occasional spree and who has a wife, family and home, may rub shoulders with the derelict. The seaman who is temporarily on the beach, may be picked up with the periodic dyspmaniac. The occasionally working longshoreman, odd-jobs man or bus boy may be picked up with a hopeless down-and-outer.

Confronted with large groups of defendants of variegated types, the tendency on the part of magistrates is to suspend sentence on all offenders if they are sober; or at the most to impose short sentences of imprisonment on those who are apparently in need of a sobering-up process. Both the suspended sentence and the short term of imprisonment are futile gestures, so far as the confirmed alcoholic is concerned. Once out in the street he merely gets intoxicated again and may again be arrested and brought to court. The worst feature of the present practice is that the judge has absolutely no data on the defendants who appear before him. It is impracticable to fingerprint everybody, and because of the pressure of cases, there may not even be time to ask a few routine questions to determine the kind of an individual that has been arrested. Under these conditions, chronic alcoholics and derelicts manage to acquire fantastic totals of arrests.

Recently the Department of Welfare took over Harts Island, to be operated as a shelter for homeless men. Harts Island is prepared to accept chronic alcoholics from the courts, since most of them belong in the category of homeless men. The judges however cannot sentence directly to Harts Island. The latter is not a workhouse or a penal institution. Men go to Harts Island on a voluntary basis. The present procedure, with chronic alcoholics and derelicts who are arrested, is to hold them for about three days, pending probation investigation. The probation officer finds out whether the defendant wishes to go to Harts Island. If the defendant refuses to go to Harts Island, he is brought before the Probation Court for sentence. The judge in this court may impose a sentence to the workhouse or he may suspend sentence and release the defendant.

If the defendant chooses to go to Harts Island, sentence is suspended on the disorderly conduct, soliciting alms or vagrancy charge, on the basis of which he was arrested, with the understanding that he stay on Harts Island.

It is too early to say how this procedure is working out. Much will depend on whether the chronic alcoholics will stay on Harts Island for any length of time and whether Harts Island will provide any facilities for dealing with their problems. Since the alcoholic is on Harts Island on a voluntary basis, the only hold on him is that, if he leaves, a Magistrate may lift the suspension of the sentence and send him to the workhouse on Rikers Island.

It would be better to designate Harts Island as a workhouse for the chronic alcoholics. Judges could then sentence offenders directly on mandatory commitments. Substantial sentences would be imposed, because the screening of the defendants by the Probation Officers would distinguish between the chronic alcoholics and derelicts and the occasional drunkards and episodic drinkers.

It would also be well to consider the establishment of a Central Screening Facility for Alcoholics arrested in Manhattan. The latter borough has most of the alcoholics. In place of bringing alcoholics to the various police stations, booking them and then bringing them to court, we believe that the alcoholics should be brought directly to such a screening facility. The latter should be staffed by doctors, social investigators of the Department of Welfare and Probation Officers assigned by the Magistrates' Court, as well as necessary Correction Department and Police personnel. The persons arrested and brought to the Screening Facility can be given a rapid physical examination and a quick interview. The interview and examination can determine which defendants are in need of medical care or institutionalization, and which defendants can be helped by further examination such as out-of-townners, who should be returned to their own communities. The personnel of the Screening Facility can also decide who are the occasional drunks, who have some roots in the city and the down-and-outers or derelicts who require prolonged institutionalization. They can determine which offenders to send to Court and which to keep in custody for a few hours because they are still too drunk to appear in court.

The data obtained by the personnel of the Screening Facility can be quickly checked off on cards which should be filled out for each defendant. With such data before him, the judge can proceed to make a more intelligent disposition of the defendants. The confirmed alcoholic who is a derelict and a down-and-outer may be sentenced to Harts Island or Rikers Island for a prolonged stay (a two years' indeterminate sentence is possible under certain circumstances.) The occasional alcoholic who still manages to do some work may be sentenced to a short sobering-up process or released on suspended sentences. The non-alcoholic who gets caught in the dragnet taking a drink from a bottle or just loitering may be released on a suspended sentence.

The chief value of the Screening Facility will be to assist the judge in deciding who are the hopeless alcoholics that are most in need of institutionalization. As things stand at the present time, a judge who goes by

physical appearance and answers to a few routine questions may send one man to jail and another out on the street. But the man who is sent out on the street, may be much more in need of institutionalization than the one sent to jail. The examination at the Screening Facility will eliminate many errors in the disposition of alcoholics and make it possible to take confirmed alcoholics off the streets for long periods. If this measure were followed up with efforts to treat and rehabilitate alcoholics at the institution to which they are committed, some progress might be made in our methods of dealing with alcoholism.

November 29, 1951

The Library

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SELECTED RECENT MATERIAL ON ESTATE PLANNING

"What's your plan? What buskin's on your foot?" ARISTOPHANES

There are those who look askance at the economic and social science material added to the library. An examination of the many skills needed in the field of estate planning will reveal the practical need of this literature. Insurance investment, accounting, in fact the entire span of human relations enter into the skill and knowledge required. "For among the multitude of facts which courts consider in determining a decedent's domicile are: where did he maintain his principal establishment, where did he spend most time, what were his church and club affiliations, where did he keep his *lares* and *penates*, where did he vote, what state income tax returns did he file, what addresses did he use on hotel registries, stock registrations, wills, deeds, and other important instruments, where did he maintain bank accounts, safe deposit boxes and custody accounts, and where did he file his Federal income tax returns"*—also in what bar did he finger crystal glass, mirrored in soft lights, warm and friendly companionship.

A good deal, if not all, of this information can be found at the House and Library of the Association.

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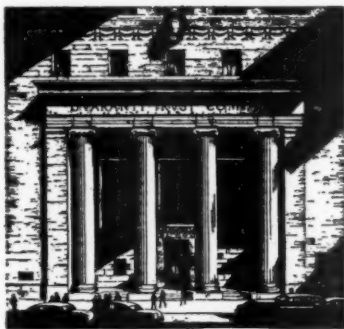
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